

**AN ENGLISH LAWYER'S VIEW OF THE NEW FIDIC RAINBOW
– WHERE IS THE POT OF GOLD?**

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CLAUSE 1 – INTRODUCTION

England and Wales, like many other countries, have a proud legal tradition. It is that of the Common Law. Common Law in this sense means a non-codified law handed down through the principles of *stare decisis* and precedents from reported or known cases. The Common Law is to be distinguished from the Civil Law as has existed in France since the Napoleonic era and is found in most other European Civil Law jurisdictions. It is of course only partially

true that England is the home to the Common Law in this sense as many other jurisdictions have equivalent legal traditions and it is also, these days, only partially true that English law is uncodified. Indeed with the hands of Brussels at so many of the switches on the control panel this basic concept of the Common Law seems is becoming less important in many areas of daily life.

The Common Law has two great branches so far as businessmen are concerned – the law of Contract and the law of Tort (civil wrong). To this may be added another relatively amorphous category variously characterised as the law of restitution or quasi-contract. Generally speaking, the law of restitution is more developed in many of England's former colonies than England itself where the rules for recovery have remained relatively constrained by the same doctrines of *stare decisis* and precedents.

It was once thought by some that Construction Law was nothing more than a manifestation of the law of Contracts, and not a particularly special one at that¹. With the enactment of special legislation dealing exclusively with Construction Contracts, for example with respect to Health and Safety and the resolution of construction disputes, this is less true than it was twenty years ago. Further a substantial body of specialist construction law case material and doctrinal writings has been developed and serves as a useful guide for legal practitioners in this area despite the occasional attempts to indicate that each Contract must be considered individually without regard to that body of law.²

When considering the FIDIC Contracts, one might reasonably think that English law can make a unique, positive contribution to their understanding and analysis. It is a simple fact that the internationalist ambitions of English engineers assisted in the spread of English civil engineering contract terminology to distant jurisdictions long before the end of the last century, and that the British Empire spread English Common Law notions, in particular for these purposes, construction law notions, literally all around the World. Finally it is well known that the first edition of the FIDIC Red Book was based on the ICE 4th edition (1955) civil engineering contract that was first published in UK.

It is indeed a fascinating exercise to go back to 19th century law reports and versions of construction contracts to see what is the history of particular construction related notions and phrases is. A simple example lies in the concept of acceleration. If one were to do a legal database computer search on the word acceleration it would, so far as I know, appear in very few modern reported English cases. It is of course a concept which is now deeply rooted in American construction contract jurisprudence. Delving deeper into the English past though I was amused to find it used in an 1850's case where they used the concept at a time when

¹ See the comment making exactly this point in the Swedish chapter

² This is indeed a strange notion considering the fundamental bases of English law itself.

unfortunate barristers clerks had to undertake a form of impact analysis long before they could call on the aid of computer assisted experts.

English law as it might be applied to FIDIC (without a specific case to consider this is always a speculative exercise) will thus be applied with a sense of historical gravity and of course equivocation because whilst the law is reasonably well established in most areas the Common Law can always develop and change as one colleague said, with new decisions to show us what the law has always been.

Implied Terms under English Law

It is reasonably well accepted that unlike many continental systems, English law, particularly the law of contracts, does not place an obligation to act in good faith on contracting parties. The law does however impose a certain number of "implied terms" into construction contracts, unless they are expressly excluded by the contract itself. There are various formulations of these implied terms but typically Claimant contractors might plead that there were implied terms along the following lines:-

1. That the Employer would not hinder or prevent the Claimant contractor from carrying out its obligations in accordance with the terms of the contract;
2. That the Employer would not hinder or prevent the Claimant contractor from carrying out the Works in a regular and orderly manner;
3. That the Employer would not hinder or prevent the Claimant contractor from completing the Works in accordance with the contractor's programme;
4. That the Employer would take all steps reasonably necessary to enable the contractor to discharge its obligations in accordance with the terms of the contract and to execute the Works in a regular and orderly manner in accordance with the programme;
5. That where in the contract the specifications named suppliers or manufacturers were listed the suppliers or manufacturers so named were able to meet the requirements set out in the terms of the contract or specification in respect of which they were listed;
6. That the Engineer would provide the contractor with correct information concerning the Works'

7. That the Employer would ensure the Engineer would properly administer the contract in accordance with its terms and would hold the balance fairly between the Employer and the contractor.

Authority for these propositions can be found amongst other places in the following cases *Shirlaw v, Southern Foundries* [1940] AC 701 (HL), *Liverpool City Council –v- Irwin* [1977] AC 239, *Merton –v- Leach* [1985] 32 BLR 68, *MacKay –v- Dick* [1881] 6 AC 251, *Luxor (Eastbourne) Limited –v- Cooper* [1941] AC 108, *Davey Offshore –v- Emerald Field Contracting* [1991] 55 BLR 1, *Holland Hannen & Cubitts –v- WHTSO* [1983] 18 BLR, *Sutcliffe –v- Thackrah* [1974] AC 727, and *Perini –v- Commonwealth of Australia* [1969] 12 BLR 90.

Some of these terms are more or less controversial, particularly terms which apply a positive obligation on the Employer or the Engineer, but there is no doubt under English law that the Employer has a duty to ensure that the Engineer is impartial. Similarly there may well be terms implied where the Employer relied on the skill of the contractor that the house built would be suitable for its purpose. Curiously, when plans and specifications are prepared for tenders, the person asking for the tenders does not generally impliedly warrant that the work can be successfully executed in accordance with such plans and specifications.³

It can be seen that implied terms do much, in reality, to make up for and perhaps even go beyond the obligations imposed by the obligation to act in good faith.

Special Consideration of the Silver Book

The Silver Book for Turnkey and BOT Projects has proven, up to the time of writing this, to be quite controversial. The stated aim of the authors is to shift away from a “fair” allocation of risk to one which places a greater burden upon the contractor⁴. In particular it has also been noted by a number of parties that the allocation of risk provisions may not in fact work under civil law systems.⁵ Under English law the principles of “freedom of contract” are such that this is less likely to be a problem although the doctrines relating to interpretation of contracts, unfair contract terms, *contra proferentum*, may all be called to aid parties having trouble with the allocation of risk under this contract. In particular, under English law contractors or indeed any aggrieved party can claim rights either under the contract or for breach of contract *Wraight Ltd v. PH & T (Holdings)* (1968) 13 BLR 26. If the claim is for breach of contract then the notification provisions should not normally apply. *Crosby & Sons v. Portland UDC* 5 BLR 121. If the Silver Book calls to be interpreted under English law by virtue of a governing law clause these are all doctrines which may be called to assist parties trying to mitigate the onerous nature of certain of the Silver Book clauses.

³ *Thorn v London* (1876) 1 App. Cas. 120 (HL)

⁴ See the (EIC) analysis of the Silver Book

⁵ See the contributions for Sweden, France and Germany in this book

English Canons of Interpretation of contracts

It must always be remembered that under English Law, the person interpreting the contract is supposed to give effect to the literal meaning of the words. The “rule” that words must be given their ordinary and natural meaning means that the law does not easily accept that people have made linguistic mistakes, but on the other hand, if one would conclude from the background that something has gone wrong, the law will not attribute to the parties an intention which they plainly could not have had. The language cannot be read in a manner that “flaunts business common-sense” *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191. However, English Judges do not, as under certain civil law systems strive to give effect to the intentions of the parties⁶.

They will also attempt to give effect to the whole of the document and to try to give meaning to every word. There is naturally still scope for interpretation, but it is not generally permitted, under English canons of interpretation to find meaning when none exists or to look behind the words to find the true intentions of the parties. The basic approach is literal, not purposive. On the other hand, one is entitled to look at the factual matrix of events surrounding the formation of the contract *Prenn v. Simmonds* [1971] 1 WLR 1381; *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 All ER 98 (HL).

Any unusually onerous conditions, especially exemption clauses, may also have to be given special prominence; otherwise they may be held not to have been incorporated into the contract. *Thornton v Shoe Lane Parking* [1971] 2 QB 163 (CA).

English law of Tort

It is always possible, in a relationship, for duties to arise both under contract and in tort. So far as construction contracts are concerned, this area has its greatest potential importance in the area of design liability.⁷ The basic modern principles were enunciated in the famous case of *Donoghue v. Stevenson* [1932] AC 562, involving a decomposed snail in a bottle of ginger beer, to the effect (Lord Atkin) that you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. This was extended to negligent statements in the 1964 landmark case of *Hedley Byrne v. Heller* 1964 AC 465, where the House of Lords held that a professional man can be held liable in negligence for statements made negligently in circumstances where he knows those statements are going to be acted on, and they were acted on.

⁶ It is interesting to note in this respect that in some Common Law jurisdictions the rule is that the court must give effect to the intentions of the parties, which seems at first glance like an adaptation of the civil law rule. This would probably be wishful thinking.

So there were three apparently simple tests to establish liability:

1. The defendant owed the plaintiff a duty of care;
2. The defendant was in breach of that duty
3. The plaintiff suffered damage as a result of that breach

As is outlined by David Cornes⁸ the law was extended gradually, especially in the area of construction contracts until the case of *Junior Books v. Veitchi*⁹ in 1983, where Employer not in contract with specialist flooring subcontractors successfully sued them for defective flooring. No allegation was made that there was present or imminent danger to the occupier as a result of the defects.

From then there was a gradual and confusing retreat as successive courts narrowed the ground upon which a successful action could be brought. Claims for “pure economic loss” always difficult, became more or less impossible unless there was negligent advice fitting squarely within *Hedley Byrne*, and with few exceptions, no recovery could arise for damage to the property itself.¹⁰

In much of the rest of the Commonwealth, however, the tests remained more faithful to the principles as originally enunciated – there was no retreat. The result is that if you have a potential case in negligence against a designer, subcontractor, the contractor or a third party you may well be more successful if the law of New Zealand, Australia, Canada, or some other Commonwealth country is applied. Of course, you still have to have an arbitration clause, unless you can make use of an ICSID type Bilateral Investment Treaty. An ordinary action in the English Courts or Courts where the damage was suffered is the final possibility.

It is unlikely, under English law and where there is a contract, that recovery in tort beyond what was recoverable in contract will be permitted by the Court or arbitrator, but it is possible *Holt v Payne Skillington* (1995) 49 CON LR 99 (CA).

⁷ See *Design Liability in the Construction Industry 4th edition*, DL Cornes, Blackwell Scientific Publications Oxford 1994

⁸ *Ibid.*

⁹ [1983] AC 520

¹⁰ This is necessarily an all to brief summary – please refer in specific cases to lawyers who can give you entirely accurate advice.

DISCUSSION OF CERTAIN GENERAL CONDITIONS

Definitions

Apparently one of the goals of the FIDIC drafting committee¹¹ was to increase the “user-friendliness” of the new FIDIC Books, amongst other things, by maximising the general conditions so as to minimise the particular conditions; and by identifying one location for essential “contract-specific” data. While this is entirely laudable, the first impression one has on reading the definitions is that “user-friendliness” has not been assisted at all by the dense level of cross-referencing needed to wholly understand these definitions. Many definitions refer to one or more of the other Sub-Clauses of the Contracts - although one may be pleased to see that “day” means a calendar day and “year” means 365 days without the need for a cross-reference. Reference might have been made here to non-Gregorian calendars.

It would also have been more user friendly to place all the Defined Terms here, as some are spread throughout the Books, and to have placed them in entirely alphabetical order.

1.1.2.1 It is interesting that Clause 1.1.2.1 defines “Party” as only the Employer or the Contractor so it is confirmed in some senses that the Engineer is not a party to the contract although this definition should have little impact on the fact that the Engineer is the agent of the Employer with the legal implications of this.

1.1.2.7 One of the most striking aspects of the new books is the “drop dead” claim provisions found in Clause 20. This might immediately give rise to the suspicion that the new contracts may be exhibiting a certain imbalance in their treatment of Contractors. One only has to go so far as Clause 1.1.2.7 and the definition of “Contractors’ Personnel” to see further inferential evidence of this. The definition of personnel is extended to “any other personnel assisting the Contractor in the execution of the Works”, a provision which probably casts the net of liability unreasonably wide. Certainly English law would not extend a contractor’s liability to include any person who assists the Contractor no matter how informally or minutely in the execution of the Works. Nor would English law consider that any such person’s actions could necessarily be imputed to the Contractor. It is of course the case that many people would argue that these provisions are essential to avoid claims “ambushes” at the end of the contract, and otherwise promote good administration of the contract. Whether or not these provisions need to be so absolute to achieve these well intentioned ends, and whether or not the provisions are themselves always going to be effective will no doubt continue to be debated in years to come.

¹¹ *The three Major New FIDIC Books* by Peter L Booen [2000] ICLR 24 at 27.

- 1.1.4.3 It is interesting that the definition of the word “Cost” in Clause 1.1.4.3 has been expanded to mean all expenditure reasonably incurred (or to be incurred) by the Contractor, whether on or off the site, including overhead and similar charges, (4th edition Red Book “other charges”) but does not include profit. Some international contractors certainly consider that overhead includes a profit element. Also the common habit of adding simple percentages to “on cost” will do little to demystify this area or reduce the scope for argument.
- 1.1.4.10 It is probably unfortunate that the particularly British concept of a “Provisional Sum” has been included in the Orange and Red Books. As a concept it is certainly not universally understood and has frequently led to disputes or at least misunderstandings, particularly in international contracts involving non-British parties.
- 1.1.5.3,
1.1.5.4,
1.1.5.7 and,
1.1.5.8 The vague and circular definitions of “Materials”, “Permanent Works”, “Temporary Works”, and “Works” – (“Works means the Permanent Works and the Temporary Works, or either of them as appropriate”) are identical in all three Contracts with the exception that the Silver Book’s definition of Permanent Works includes permanent works to be designed and executed by the Contractor under the Contract. This does very little to clear up the conceptual confusion in the distinction between permanent works and temporary works, which can, be worth literally tens of millions of dollars in certain types of contract. Grouting in tunnels is only one example of a “Material” which may be part of both the temporary and permanent works, and which may or may not qualify for payment.
- 1.1.6.8 “Unforeseeable” – It is welcome to have a contractual definition of what is or is not foreseeable and the choice here of what is not reasonably foreseeable by an experienced contractor by the date of submission of the tender seems like a reasonable choice. This is despite the fact that one can easily and reasonably foresee situations where differences of opinion could arise as to whether or not a particular event or circumstance was unforeseeable within the terms of this definition. Further, what happens if something “not reasonably foreseeable by an experienced contractor....” was actually foreseen by the contractor in question? Our German contributors point out that in fact, everything is foreseeable (and has probably been experienced) by experienced international

contractors. Whether or not provision is made in the price for them is an entirely separate matter.

- 1.1.6.9 “Variation” (1.1.6.8 Silver Book) This definition is surprisingly restrictive. It starts off well: - “any change to the Works” but then goes on to say “instructed or approved as a variation under Clause 13”, with the implication that if it is not so instructed or approved, it is not a “Variation” as defined. This makes claims for breach of contract, for failure to instruct or approve, more likely under the new suite than under the Red Book 4th edition.

What is or is not a variation will depend primarily on a proper construction of the contract provisions *Henry Boot Construction Limited v Alstom Combined Cycles Ltd* 1999 3 QB 123; [2000] BLR 247 (C.A.) and if additional work is carried out which does not fit within the contractual definitions, then the normal English law principles relating to restitutionary rights or damages for breach of contract will apply (so long as the claim has been framed in the appropriate fashion).

Interpretation

- 1.2 Sub – clause 1.2(c) stating that provisions including the words “agree”, “agreed”, or “agreement” require the agreement to be recorded in writing can be a trap for the unwary, and would be interpreted literally under English law. However, absent an agreement in writing, if one party acts on an oral agreement to their detriment, with the knowledge of the other party, this may give rise to an estoppel.

Communications

- 1.3 This is the main “everything must be in writing” provision, which is no doubt a helpful precaution. The comments under 1.2 above apply equally here.

The development of the newer forms of project collaboration software, allowing for online real time exchanges may very well facilitate this, and with the European directives on electronic signatures, there should be no problems with legality, at least so far as Europeans are concerned.

It is appropriate to include in the Contracts the concept found in 1.3 that “approvals, certificates, consents and determinations shall not be unreasonably withheld or delayed”. It is of course an open question as to what will constitute

an unreasonable withholding or delay, but if it is found to have happened, the result will probably be a breach of contract by the Employer.

In the case of *Lafarge Redlands Aggregates Ltd v. Shephard Hill Civil Engineering* (HL) 27 July 2000 the House of Lords held that what is a reasonable period of time is in almost every case a pure question of fact, but that if other parties rights are involved (such as subcontractors) then other questions may come into the equation. They held as a matter of law that the contractor could not justify an 18 month delay in fighting a subcontractor in arbitration because the contractor wanted to negotiate a settlement with the Employer.

Law and Language

- 1.4 It is unfortunate that the drafters here chose to require that a positive action of stating the governing law and language. There is already at least one new form FIDIC contract, with the dispute well underway, where no governing law was stated in the Appendix. It is just a matter of good draughtsmanship to provide default provisions so that there is as little uncertainty as possible in the general conditions. It would have been very simple instead to have stated that the Contract shall be governed by law of the country (or other jurisdiction) where the Site is located unless otherwise stated in the Appendix to Tender. In the real World few employers will agree to a governing law other than the law of their own country.

Similarly, it should be remembered that a failure to state the language governing in any arbitration or DAB proceedings will leave open the possibility, more likely with the ICC Rules than some others, that disputes may not be conducted in the same language as the contract language.¹²

Priority of Documents

- 1.5 The Orange and Red, but not Silver Books, contain the statement "If any ambiguity or discrepancy is found in the documents, the Engineer shall issue any necessary clarification or instruction." This may or may not involve a Variation from the contractor's point of view, and it has to be read with the notification of errors provision in Clause 1.8. Not infrequently, no clarifications are issued and the DAB or Arbitration Tribunal end up resolving the question.

One problem these books do not deal with well is documents which are not described in the categories set out. They then become by default “...any other documents forming part of the Contract” and are ranked at the bottom of the priority league.

Another problem that frequently occurs here is what to do about ambiguous and contradictory correspondence. Often exchanges of pre-contract letters about the price and other vital elements of the Works will be bound in to the contract, and under English law, efforts have to be made to give sense to all the parts of the Contract. While on the one hand, the priority will be respected, on the other, resort may be made to legal maxims such as “specific wording governs over general” or “the last in time prevails”. The result of sloppy last minute changes may be uncertainty and an unsatisfactory priority for specific provisions.

Contract Agreement

- 1.6 Under English law it is quite possible that a contract would be formed by acceptance though the Letter of Acceptance of the Tender with nothing further.¹³ The definitions of “Letter of Acceptance” at 1.1.1.3 (not in the Silver Book) and the provisions of Clause 1.6 requiring the parties to enter into a Contract Agreement 28 days after the letter of acceptance, may eventually create some interesting case law, but at first glance there is little reason to deviate from the view that the contract will be formed when the parties agree it will be formed. The basic elements of a building contract under English law are simply and offer, acceptance consideration and a certain amount of certainty as to the terms, especially the price. These elements can be, and have been found to exist, in bid correspondence prior to the execution of formal contract documents.

Assignment

- 1.7 Assignment under English law is not governed particularly by formalities requiring, for example, notice. Nonetheless, the legal consequences of the various complicated structures that happen in practice have led over the years to some convoluted case law about legal and equitable assignments, and the devolution of responsibilities and rights down the chains of relationships.

Delayed Drawings or Instructions

¹² Note Article 16 of the ICC Rules which allows the language of the arbitration to be a language other than the language of the contract.

¹³ See an example of this issue being raised in *VHE Construction Ltd v. A McAlpine* [1997] CILL 1253.

- 1.9 This clause has been expanded from the previous drawings clause (Clause 6.4 in the Red Book) to include the concept of drawings or instructions, the latter being a rather wider and more important concept. The Contractor will be entitled to money and/or time if instructions or drawings are delayed but if the instruction or drawing is delayed as a result of the Contractor's fault no such entitlement will exist. This could be a fruitful source for claims and indeed counterclaims, as the cause of any delay (or in fact the existence of the delay), can be unclear in many projects of a reasonable size.¹⁴

CLAUSE 2. THE EMPLOYER

Right of Access to the Site

- 2.1 A potential claim will exist if the Employer does not give a right of access by the time/s stated in the Appendix to Tender. However, that right of possession may not be exclusive to the Contractor. Read this Sub-Clause with Sub-Clause 4.6. Differences may very well exist as to what level of co-operation may be expected without claims, where for example, footing contractors are late and thus delay erection contractors.

Permits, Licences or Approvals

- 2.2 English law does not yet impose any general obligation of good faith on contracting parties, so the contractual requirement that the Employer provide "reasonable assistance" with "permits, licences or approvals" under the Laws of the Country, should be particularly helpful where the Employer is a government. Alleged failure or inability to obtain visas, for example, comes up quite frequently as an excuse for late performance. A clause requiring "reasonable" assistance should not be interpreted as requiring assistance regardless of the cost. For example, if the employer is a state government in a federal state, then it may be unreasonable to ask that it do anything other than write some imploring letters to the federal authorities controlling visas.

This provision may perhaps also be invoked in circumstances where there is a nasty surprise at the end of the job, with government/customs/tax inspectors coming onto site and alleging gross breaches of this or that obscure statute. It does however have to be read with the clause requiring compliance with all local laws, which implies knowledge of those laws. If you know the laws, you will

¹⁴ See the *McAlpine Humberoak v. McDermott International* (1992) 58 BLR 1 (CA). case, mentioned with respect to acts of prevention, as an example of a case under English law which failed for lack of proof about such delays.

know as well that some body other than the department you are dealing with will normally have the discretion as to when and how visas should be issued.

Employer's Financial Arrangements

2.4 This clause requires the Employer to submit reasonable evidence to the Contractor that “financial arrangements have been made and are being maintained which will enable the Employer to pay the Contract Price (as estimated at that time) in accordance with Clause 14 [*Contract Price and Payment*].” Whilst this may be seen as a concession to the reasonable interests of Contractors, it does not of course require the Employer to pay as this is dealt with by the payment provisions.

The areas where this may prove useful to Contractors as an early warning system, rather than as a separate independent right to sue the Employer, would be in BOT or private finance type arrangements where the Employer was only entitled to draw against a line of credit provided by Banks or Funding Agencies upon certain conditions. If those conditions were not being met this would presumably be a “material change to the financial arrangements” which the contractor should know about.

Another area where this may come in helpful is in relation to funded arrangements where, sometimes, the special purpose vehicle for a project is due to be wound up within a relatively short time after the end of the defects liability period or the government department's line of credit from the funding agency is due to expire. One has seen settlements of major claims made simply on the basis that the (impecunious) government department would be losing its right to a drawdown within a relatively short period of time.

At least one author has questioned whether or not this clause is so vague as to be unenforceable. If it is enforceable, the clear implication under English law is that a failure to respond truthfully to such a request, or even failure to warn of “material changes” might expose the Employer to an award of damages for breach, or even in some cases to damages for the tort of deceit.

Employer's Claims

2.5 If the Employer “considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period, the Employer or the Engineer

shall give notice and particulars to the Contractor.” Such notice is required to be given “as soon as practicable after the Employer becomes aware of the event or circumstances giving rise to the claim”, but there is no “drop dead” date. It is noticeable that it is the Employer’s knowledge and not the Engineer’s knowledge that is relevant here.

Those of us who have worked with the “as soon as practicable” concept will know it to be rather flexible. For example, it would take a brave arbitrator to reject the notion that say three weeks was “as soon as practicable” but four weeks was not. “As soon as practicable” is not as quick as “as soon as possible” and the Employer would not have to “drop everything” to put the claim in. “As soon as practicable” connotes doing something with all reasonable dispatch having regard to all the circumstances *Pezim v. British Columbia* (1992) 96 DLR (4th) 137 at 149 (BCCA)

A striking aspect of these contracts is the contrast between these rather friendly provisions and the harsh regime set out by the second paragraph of Clause 20.1 which simply states that if a Contractor fails to give notice of a claim “as soon as practicable, and not later than twenty eight days after the Contractor became aware, or should have become aware, of the event or circumstance.” – otherwise the claim is supposed to be effectively dead.

Under English law, exclusions of the common law rights of abatement and set-off will only be established through very clear language, *Federal Commerce v Molena [1978] QB 927*, and that is probably intended here by the last paragraph, but when one examines the cases on the topic, one feels it would have been best to expressly mention “equitable” set off.¹⁵

Nonetheless, the structure of this contract suite now raises squarely the issue of whether or not the intention of the draughtpeople was to provide a hermetically sealed and complete dispute resolution scheme with **all** claims, whether by the employer or contractor having to go through the employer or contractor claims dispute structure in order to be recognised. The fact is, whatever the intentions of the draughtspeople, this question is doomed to be answered imperfectly because different tribunals in different places and times, will no doubt answer the question differently. To take one obvious example, under the laws of some

¹⁵ See *NEI Thompson Ltd v Wimpey Construction* CILL 1987 p378 (CA) where a requirement existed that notice be given before “any payment” was withheld, it did not exclude the right to withhold payment by way of equitable set off. Conversely, a clause guaranteeing regular payment was not effective when the contractor breached the contract *Sonat Offshore v Amerada Hess* Cill November 1987 p375 (CA)

countries, it is not possible for non-state tribunals to decide questions involving certain interim or conservatory measures.

CLAUSE 3 THE ENGINEER

The Engineer features in the Red and Orange Books. Under English law it has long been established that for some duties at least, he must be independent and impartial. *Sutcliffe –v- Thackrah* [1974] AC 727. In practice, this requirement is often somewhat imperfectly observed, even in England.

Remember it is possible under English law for the Engineer to owe a duty to others under the *Hedley Byrne* principle, but again in this area theory and practice are somewhat removed from each other.

Engineer's Duties and Authority

3.1 The language of this clause encapsulates in a succinct contractual fashion some of the contradictions inherent in the role of the Engineer. Thus:-

“The Employer shall appoint the Engineer who shall carry out the duties assigned to him in the Contract ...The Engineer shall have no authority to amend the Contract. The Engineer may exercise the authority attributable to the Engineer as specified in or necessarily to be implied from the Contract.”

Hence for example under Clause 13 “variations may be initiated by the Engineer ...” but he has “no authority to amend the Contract” or to “relieve either Party of any duties, obligations or responsibilities under the Contract” even though (Sub-Clause 3.1(a)) whenever carrying out duties or exercising authority, specified in or implied by the Contract, the Engineer shall be deemed to act for the Employer.

The fact is that engineers normally have an extremely important impact on the progress of a project and its eventual success or failure. In administering it they can, and often do, cause *de facto* changes to the obligations of the parties and thus amend the contract. It is quite normal in international construction contracts to see numerous actual minor breaches of the contract on the part of engineers acting as agents for the employer which at the end of the day may be difficult or impossible to actually attribute to the employer, perhaps because of the very real

human tendency to distinguish between the acts of an agent and his principal, despite the frequent legally indistinguishable nature of their actions.

One of the most remarkable aspects of this clause is perhaps the very clear language set out and cited above stating that the Engineer has no authority to amend the Contract and that he is always deemed to be acting for the Employer (while on the other hand saying no action or omission of the Engineer can relieve the Contractor from any responsibility). This should be reasonably effective to insulate the Engineer from any liability towards the Contractor unless, perhaps, it is something like a statutory liability such as that imposed under health and safety legislation which cannot be affected by the terms of the Contract and which is engaged by the simple fact that a construction activity is taking place, or liability in tort.

It is sometimes thought on the back of cases such as *Pacific Associates v. Baxter* [1993] 1 AC 993 that engineers cannot under any circumstance have any legal responsibility under English law to contractors¹⁶. From the practical point of view, that is from the perspective of whether or not arbitrators or courts will hold engineers accountable to the contractor for their deeds or misdeeds insofar as they have affected the contractor's performance under the contract, it is not likely that in all cases they will be held to be beyond effective legal reproach.. The legal manner of expressing this would be to say that employers have been relatively frequently held responsible for the actions of their engineer acting as an agent. Similarly, contractors may receive relief one way or another if the Engineer has failed in his "duty" as a "quasi arbitrator", for example in certifying or determining claims.

I see no reason why, by way of illustration, Engineers could not under the wording of this contract and in particular circumstances be held to be liable for the tort of actionable interference with contract, see, for example *John Mowlem v Eagle Start Insurance & Others* (1992) 62BLR 126 (QBD). It simply feels wrong to think that a party could be in a position of power but have no responsibility and English law has not, historically, been happy to adopt such a position. The *Hedley Byrne* principle continues to develop. Engineers can be held to have acted negligently for their employers – see *Imperial College v Norman & Dowbarn* (1986) 8 ConLR 107 (QBD).

Another factor which may very well affect this situation is the new Contracts (Rights of Third Parties) Act 1999 which came into force in England in May

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See for examples the contrasting discussions of this point in the Singapore and Malaysian chapters.

2000. Traditionally the concept of third party beneficiaries to contracts has not existed under English law, a fact which along with the absence of the doctrine of good faith (both of which exist under American law) has from the juridical point of view made English contracts rather distinctive.

It may well be the case that the Contractor is a third party upon whom a benefit is conferred in the Contract between the Employer and the Engineer for the performance of the Engineer's services as Engineer under the Construction Contract. The Engineer also has duties to act fairly in the administration of the Contract and to observe certain standards. Under the Contracts (Rights of Third Parties) Act 1999 if the Engineer is in breach of these provisions the Contractor may, subject to the requirements of the Act, be in a position to claim damages against the Engineer for failure to reach those standards. The possibility of this is recognised in English forms by the exclusion of the effects of this Act. Whether or not the Act would affect parties to an overseas contract who have chosen English law as the governing law may be an interesting question.

Insofar as the contractor's actions certainly generate revenue for the Engineer, the Engineer may also be thought to be a third party beneficiary to construction contracts. The full implications of this have yet to be worked out, as it is still early days so far as the Act is concerned¹⁷.

3.3 **Instructions of the Engineer** (Orange and Red Books)

One of the interesting aspects of this clause is that the sentence "The Engineer may issue to the Contractor (at any time) instructions and additional or modified Drawings which may be necessary for the execution of the Works and the remedying of any defects, all in accordance with the Contract." may be thought at first glance to be some sort of additional empowerment of the Engineer, over and above the variations provisions. This is especially so when read with the first sentence of clause 4.1 stating that the Contractor shall design (to the extent specified in the Contract), execute and complete the work in accordance with the Contract and with the Engineer's instructions, and shall remedy any defects in the Works.

One has come across on several occasions personally of Engineers purporting to vary the scope of the Contractor's obligations to some considerable extent and deny that a variation in the sense of Clause 13 has taken place by reference to this general language (or its predecessors) as found in Sub-Clauses 3.3 and

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Even on review of this text in 2003.

4.1 read together. Given the central role now accorded to Engineer's Determinations under Sub-Clause 3.5 and the limited nature of Variations as defined it now seems clear that a Variation is just one variety of Instruction the Contractor has to comply with. Ones which modify the contractors work to bring it in line with his contractual or statutory obligations are normally instructions which do not give rise to rights to increased payment.

It is interesting that Sub-Clauses 3.3 and 4.1 together are the current equivalent to the former Red Book Clause 13.1 but have removed the possibility for the Contractor to comply if works are not "legally or physically impossible" and have also removed the reference to the satisfaction of the Engineer. Nonetheless, under Sub-Clause 4.1 the Engineer may instruct whether he is "satisfied" or not. Presumably Clause 19 is the (more logically placed) replacement of the impossibility concepts.

3.4 **Instructions** (Silver Book)

Here, to reflect the Contractor's greater design responsibility, the Employer must refer to specific contractual clauses where the obligation arises, and the Sub-Clause expressly contemplates the possibility that the instruction may be a Variation.

CLAUSE 4 THE CONTRACTOR

4.1 **Contractor's General Obligations** (Orange and Red Books)

The relationship between Sub-Clauses 3.3 and 4.1 has already been discussed above. One further point which might be made on construction is that Clause 3.3 requires the Contractor to comply with the instructions given by the Engineer or delegated assistant, on any matter related to the Contract whilst 4.1 only requires the Contractor to design (to the extent specified in the Contract), execute and complete the Works in accordance with the Contract and with the Engineer's instructions ... It can be seen that whilst on the one hand, "in accordance with the Contract" may be seen to incorporate by reference clause 3.3 with its wider notion of "any matter related to the Contract", it might also be easily imagined that specific instructions might be on a matter related to the Contract but either not necessarily "in accordance with the Contract" or, indeed, dealt with in any way by the Contract. In both such cases the instruction should be put forward as a Variation, unless it deals with an unfulfilled obligation or remedial works.

All Books

The fitness for purpose obligation found here (in Sub-Clause 11.3 and all the other clauses, such as the payment clauses that refer to work being in accordance with the provisions of the Contract) was the subject of some controversy, and as it is “as defined in the Contract” will be open to many interpretations. This is all the more so as Sub-Clause 11.3 does not contain the “as defined in the Contract” qualification, but this may in any event be implicit.

The fitness for purpose obligation is not controversial in some jurisdictions because it already exists (see the German chapter for example) but in others it could well be misunderstood. See the discussion on this point found below in response to Sub-Clause 5.4.

4.2 Performance Security

The law in England and Wales relating to Bonds and Guarantees is complex but generally in line with international norms. That is to say the performance securities are generally thought to create obligations separate and distinct from the underlying contract for which performance is guaranteed. Enforcement must be strictly in accordance with the terms of the instrument and whilst it is thought by some that fraud will constitute an exception to the general rule that the instrument is enforceable in accordance with its terms, my impression is that the scope of this exception and its application is not as clear in England as it is in some civil law countries.

The American notion of sureties is not widely known in England and my impression is that Annex D with its alternative forms of wording could raise some interesting issues in the English Courts. It is noticeable that the examples of the performance security, advance payment guarantee and so on do not refer to any form of dispute resolution process. It also seems to me that in England Section 8 of the Contracts (Rights of Third Parties) Act 1999 relating to third parties rights to and obligations to undertake arbitration where an arbitration agreement exists may in some circumstances result in a requirement that obligations to pay under these Bonds will have to be arbitrated where an arbitration agreement exists in relation to the main Contract.

Sub-Clause 4.2(c) allows the Employer to make a claim under the Performance Security upon a “failure by the Contractor to remedy a default within 42 days after receiving the Employer’s notice requiring the default to be remedied”.

Whilst the Sub-Clause 4.2(d) is reasonably extraordinary in allowing a claim to be made in “circumstances which entitle the Employer to terminate under sub-clause 15.2 [*Termination by Employer*], irrespective of whether notice of termination has been given [emphasis added]. This provision is quite favourable to forceful employers and will give Employers minded to use it in this fashion a very strong weapon in end of Contract negotiations on the final sums due to the Contractor. The new Sub-Clause is a surprising derogation from the protection afforded to the Contractor under clause 10.3 of the Red Book FIDIC 4th Edition 1987 which at least entitled the Contractor to a notice before the Employer makes a claim on the Performance Security. This could of course be redressed by simple additions requiring notice in the security instrument itself.

4.4 **Sub-Contractors** (Red and Orange)

The bold statement that “The Contractor shall be responsible for the acts or defaults of any Sub-Contractor, his Agents or Employees, as if they were acts or defaults of the Contractor.” may be somewhat difficult to reconcile with some areas of English law in relation to Sub-Contractors as contractors are not always liable for every action of every sub-contractor. The case law as developed is largely to the effect that to the extent that particular materials are the responsibility of the Sub-Contractor and the Contractor had no choice in those materials the Contractor should not be responsible for the design. Sub-Clause 5.2(c)(ii) states that the Sub-Contract should specify that the Sub-Contractor and should indemnify the Contractor against failures of the Sub-Contractor is a theoretical counter-balance to this problem but presupposes that objections will be made (at a time when relations may be quite rosy and the Contractor may not wish to seem difficult) and that the defects or failures in obligations will be back to back.

It should also be pointed out that under English law assignment of the benefits of sub-contracts as contemplated by sub-clause 4.4(d) is not an entirely straight forward subject even if, as seems to be assumed here, the sub-contract assignment provisions have been fully thought out and modelled for the particular Contract and Sub-Contract works.

4.10 **Site Data** (Red Book)

At first glance this clause seems to be quite reasonable when compared to FIDIC 4th Edition Clause 11. It is however qualified by the requirement for the Employer to only turn over “relevant” data which makes this a question of

subjective opinion which was not the case in the past – all data had to be turned over. The notion of relevance in this circumstance seems to open up the possibility that something could be considered to be foreseeable but not relevant and thus not caught by this provision.

The Silver Book version of Sub-Clause 4.10 includes the Employer's obligation to disclose relevant data on subsurface and hydrological conditions, and also makes the Contractor responsible for "verifying" and interpreting such data, but goes on to purpose to exclude the Employer's responsibility for the "accuracy, sufficiency or completeness" of such data (except as stated in Sub-Clause 5.1). This exclusion of responsibility may well fall short of the standard of "reasonableness" under the UCTA 1977. See *Mitsui v. AG of Hong Kong* 33 BLR 1.

- 4.11 The deeming provision in clause 4.11 has similarly been qualified by the concept of relevance and has been expanded to include the notion that the Contractor shall be deemed to have satisfied himself as to the laws, procedures and labour practices of the Country.

It should be mentioned here that under English law deeming provisions normally only create presumptions which may or may not be rebuttable. So for example in underground tunnelling works it is a nonsense to say that the Contractor is deemed to have examined and inspected the whole of the length of the tunnels when the parties knew beforehand this manifestly could not be the case.

4.12 **Unforeseeable Physical Conditions**

This is an interesting evolution of the famous Clause 12.2. Under FIDIC 3rd Edition clause 12 it was not unheard of to see arguments that, for example, a strike at a vital port was an "Adverse Physical Condition and Artificial Obstruction", the theory being that a strike which actually prevented materials from being delivered to the site was an "artificial" obstruction. FIDIC 4th Edition clause 12.2 "Not Foreseeable Physical Obstructions or Conditions" put an end to this interesting if rather difficult argument because it clearly refers to "Physical Obstructions or Physical Conditions". Interestingly the new Sub-Clause 4.12 opens with the phrase "In this Sub-Clause "physical conditions" means natural physical conditions and man-made or other physical obstructions and pollutants,". The strike in the port argument has been resurrected as this could clearly be considered to be "a man-made ... physical obstruction".

The problem of course with the port argument was that under the previous editions the encountering of physical obstructions or conditions was limited to physical obstructions or conditions on the Site. It was difficult to argue that a strike at the port was a condition encountered on the Site. However this problem does not exist in the current edition because the obstruction or condition merely has to be encountered at the Site and logically there is no reason why something taking place many miles away might not have an effect at the Site, which is the wording now to be used.

By way of comment it seems strange that the concept of “pollutants” has been singled out although environmental contamination issues have been of very high visibility in recent years. It seems to indicate that, for example, the forest fires which afflicted the atmosphere in South East Asia recently could be cause for a claim. Indeed, considering the commentary on clause 4.10 above, such forest fires may be considered to be “foreseeable” but not “Site Data” relevant to tender preparation.

There are other potential difficulties here. Consider a case where tropical rains have reduced an unpaved soil access road to a state of virtual impassability. If this was at the Site could it be considered to be a “sub-surface and hydrological condition” or would it be excluded by the proviso excluding “climatic conditions”.

One of the more controversial aspects of clause 4.12 will be the provision allowing the Engineer to review whether other physical conditions in similar parts of the Works (if any) were more favourable than could reasonably have been foreseen when the Contractor submitted the Tender, and to reduce the increase in costs by reference to the reduction in Cost due to those more favourable conditions. This has of course been an argument employed by Engineers and Quantity Surveyors for a very long time and is not obviously fair. Underlying it is the notion that Contractors should not be allowed any more profit than they might have expected at the start of the works, even if the conditions are worse than expected.

There is a fair amount of English case law on the ICE equivalent of this Sub-Clause.

4.15/4.16 **Access Route/Transport of Goods**

The previous clauses in FIDIC 4th Edition relating to this (29.1 through to 30.4) did not so clearly place the responsibility for damage caused by traffic on the

Contractor. Sub-Clause 4.15 clearly states that costs due to non-suitability or non-availability, for the use required by the Contractor, of access routes are to be borne by the Contractor and that the Employer is not responsible for any claims which may arise from the use or otherwise of any access route. Referring to my tropical road example above, it does not seem to me that this is entirely reasonable in terms of allocation of risk particularly if the Employer is a government or government department, which may be directly or indirectly responsible for the road in the first place.

It also seems that there may be a possibility at least that, regardless of the provisions of the Contract, insofar as they required a particular form of transport the Employer/Engineer may be jointly responsible to third parties by virtue of the law relating to joint liability of tortfeasors.

4.18 **Protection of the Environment**

Under this clause the Contractor is required to take all reasonable steps to protect the environment (both on and off the Site) and to limit damage and nuisance to people and property resulting from pollution, noise and other results of his operations. Although even a limited survey of the law relating to environmental contamination is not possible here, it is again not at all clear under English law that a Contractor working at the behest of an Employer would be solely responsible to third parties under English Law for environmental contamination or pollution coming from property owned by the Employer.

CLAUSE 5 DESIGN (SILVER AND ORANGE BOOKS)

5.1 **General Comments - Design (Silver and Orange Books)**

Clause 5.1 of the Orange Book contains a warranty that the Contractor, his designers and design Subcontractors have the experience and capability necessary for the design.

Both Contracts include a Contractor's undertaking as follows:-

The Contractor undertakes that the design, the Contractor's Documents, the execution and the completed Works will be in accordance with:-

- (a) The Laws in the Country, and

- (b) The documents forming the Contract as altered or modified by Variations.

Under English law this is a useful addition. There is no particular reason to assume that a contractor building something in England would be in breach of contract merely because the thing constructed did not comply with every law that might apply to it.

5.4 **Technical Standards and Regulations**

All Contracts also include an undertaking here in 5.4 that the design shall generally comply with all of the Country's technical standards and other standards specified in the Employer's Requirements applicable to the Works.

It is of course self-evident that every contractor must comply with the local laws or risk being in breach of those laws.

The phrase "be fit for such purposes for which the parties intended as are specified in the Contract" is found in Sub-Clauses 4.1 of the Silver, Orange and Red Book. Under English law the notion of being fit for the purposes for which the part is intended brings to mind case law which indicates that a particular item may be fit for the particular purpose for which it is intended but not fit for general or extraordinary purposes for which it was not designed.

For a number of years now I have been making the point that internationally this phrase is most certainly going to be interpreted in a different fashion in different jurisdictions. It is a concept relating to the sale of goods in English and Commonwealth law and, with variations, in American law relating to the sale of goods. It is quite wrong to attempt to take phrases like this out of its particular context and apply it in international circumstances where the lack of uniform interpretation will almost certainly lead to subjectivity in interpretation and application.

Of course as the Contractor's design has to comply with the standards set in the Employer's Requirements, there is nothing to prevent an Employer from stating in those requirements that the design will be "state of the art" and fit for all purposes. This in turn could lead to the application in both the Orange and Silver Books of Sub-Clause 5.8 stating:-

"If errors, omissions, ambiguities, inconsistencies, inadequacies or other defects are found in the Contractor's Documents, they and the Works shall

be corrected at the Contractor's cost, notwithstanding any consent or approval under this Clause."

The avoidance of broad language and production of detailed and measurable specifications by the Employer is much to be preferred. Otherwise, disputes are bound to find fertile ground in these concepts.

CLAUSE 7 PLANT, MATERIALS AND WORKMANSHIP

7.7 Ownership of Plant and Materials

This Sub-Clause basically provides that any plant or material which is intended to form part of the permanent Works becomes the property of the Employer "free from liens and other encumbrances" when it is delivered to the Site.

English law relating to the passing of property in goods is reasonably complicated. This contractual provision would under English law do little to resolve the "battle of the forms" and it is certainly the practice of many material suppliers in the United Kingdom to provide that property will not pass until payment is made at a time which may very well be some time after the date of delivery of the goods to the Site.

Whilst in England itself developed builders lien legislation does not exist, in other countries where the FIDIC forms might be used, there is the possibility of conflicts between local builders lien legislation and the provisions of the Contract. One might then have the prospect of a FIDIC Contract governed by English law having to be reconciled with protective legislation for subcontractors in the jurisdiction where the Site is located. The local legislation is, practically, more important as the Subcontractor/Supplier could if necessary send in the bailiffs in the event of non-payment or other dispute. As the Contractor is contractually obliged here to deliver the plant or material free from liens or other encumbrances, the headache might ultimately be his, as this Sub-Clause may place him in breach of contract vis a vis the Employer, despite the right of his material supplier to place lines on the Site.

CLAUSE 8 COMMENCEMENT, DELAYS AND SUSPENSIONS

General Comments

Under English law one of the primary areas of concern with respect of these provisions would be the potential applicability of the doctrine of “acts of prevention”. Under this doctrine if there is no provision for an extension of time or none is granted when it should have been and if an employer “prevents” through his own actions the contractor from completing within the specified time for completion, time becomes “at large” and the contractor is given a reasonable time in which to complete *Peak v. McKinney* (1969) 1 BLR 111 (CA). Liquidated damages fall away. Note that there are two requirements – the first being no mechanism for extending time, and the second being an act of prevention which actually prevents completion on time.

The doctrine sounds quite radical but is in fact simply a particular application of Roman law doctrines to the effect that parties should not be judges in their own causes, and parties should not be allowed to benefit from their own breaches of contract. This being the case, one could wonder whether Arbitration Awards are floating around with the effective application of this doctrine in civil law jurisdictions.

The English judicial tendency in recent years has been to attenuate somewhat the strict observation of the consequences of the doctrine and the extent to which it might be relied upon by Contractors, especially when they are looking at citing it because they were not given an extension for a last minute variation instructing them to paint the last door in a large building from red to green *McAlpine Humberoak v. McDermott International* (1992) 58 BLR 1 (CA).

It is perhaps unfortunate that the word “prevention” continues from the 4th edition Red Book (it was not in the 3rd) in Sub-Clause 8.4 of all three versions of the Contract as this is a peculiarly English concept which has not been widely exported and, although long standing, it does not have particularly well defined boundaries.

Non-English lawyers should know as well that English law does not easily encompass doctrines such as the doctrine of constructive acceleration found in American law.

Another aspect of English law which should be important for parties to bear in mind is that the extension of time provisions generally are thought to have been inserted for the benefit of Employers rather than Contractors in order to alleviate the potential consequences (including the right to payment of liquidated damages) of the doctrine of acts of prevention. This approach may be contrasted with the Swedish analysis found in the Swedish chapter. Thus although some commentators may disagree with this, and although the wording of the clause would not in any way indicate this, the clause exists for the benefit of Employers to preserve both their liquidated damages and the security of the time for completion. Ironically therefore the more severe the notice and implementation provisions of the extension of time clause are

the more likely it is that time will be set “at large”. The efficacy of the FIDIC provisions is thus questionable when viewed in this way. The more difficult the extension provisions are to work, the more likely it is that time will be put at large by the actions of the Employer or his Engineer.

One of the main areas under English Law giving rise to problems in relation to extensions of time is the question of concurrent delay. Under this scenario there are a number of simultaneous or over-lapping causes of delay which cumulatively delay the works as a whole. Some will be attributable to employer and some to the contractor or to third parties. Generally speaking the rules in relation to this are well settled, but they are not necessarily susceptible to simple abstract codification.

The Society of Construction Law attempted in 2002 to establish a Protocol setting out what the general rules are, but was compelled successively to water down it’s code until it became simply a statement of (asserted) best practice. One of the major failings of the Protocol is that it imported the purely American solutions to complex concurrency namely that the contractor gets “time but no money”. This pre-CPM solution has its merits but cannot be in any way asserted to be the solution arrived at by English law.

Network Analysis and Delay

While reported English decisions do not go into the depth of analysis sometimes found in the American law reports relating to network analysis, the established principles are relatively clear and Britain is home to a large number of specialised claims consultants, some homegrown and some affiliated with American organisations, who ensure that the very latest techniques are always used in producing this type of analysis for determining the net amount of delay and its costs. The probative value of the analysis may well be attacked if it is not based on actual data.

8.4 Extension of Time for Completion

Sub-Clause 8.4 of the Silver Book does not, like it’s sister books, include “exceptionally adverse climatic conditions” or “unforeseen shortages in the availability of personnel or Goods caused by epidemic or Government actions” as a reason for an extension. Under English law if the Employer is a government and government actions prevent the contractor from completing on time this may well amount to an “act of prevention” within the meaning of the phrase for which an extension cannot be granted. This is because under this Contract (see Sub-Clause 1.1.2.2 where “Employer” means the person named as the Employer in the Contract Agreement and the legal successors in title to

this person) it is an open question as to whether or not this includes government bodies higher up the tree of government authorities over which the actual Employer under this contract may have no control.

In such circumstances the claim would have to be shoe-horned into Sub-Clause 8.5 Delays Caused by Authorities. However another problem with Sub-Clause 8.5 generally is that one could argue it is always reasonably foreseeable by an experienced Contractor, especially in international contracts, that legally constituted public authorities can delay and disrupt contract work¹⁸. The exact method by which the Works will be delayed may not be foreseeable and one thus is faced with a philosophical question as to what type or degree of foreseeability is necessary to create liability.

8.7 Delay Damages

Liquidated damages for delay must be a reasonable pre-estimate of the actual cost of the damage under the leading case *Dunlop v. Pneumatic Tyres v New Garage* [1915] AC 79. Daily rather than lump sum amounts are more likely to satisfy this test. The second paragraph of Sub-Clause 8.7 sets out that the delay damages shall be the only damages due from the Contractor for such default. Even in the face of this express wording I would not exclude under English law the possibility, canvassed in some cases, that although liquidated damages apply, general damages may in certain circumstances still be payable, as this right does exist in English law *Peak v. McKinney* (1969 1 BLR 111 (CA)).

An interesting and as yet not definitively settled question would exist in this area – what happens if the delay damages are not payable because, for example, there were acts of prevention? Normally under English law general damages would be payable, but if the Canadian Supreme Court case of *Elsley v. SG Collins* (1978) 3 DLR (3rd) 1, is followed, the liquidated damages clause may act as a cap on any general damages recoverable where the clause is not directly applicable.¹⁹

¹⁸ See the discussion by our German contributors of this foreseeability issue.

¹⁹ Hamish Lal, a member of the Freshfields law firm, has written some interesting and well publicised papers on these questions in 2002-2003. He points out that there is (at least) one area in which there is an “absurd paradox” such clauses are intended to take effect where there is a breach of contract. – Consequently, if no breach of contract occurs, there may be no room for the application of the *Dunlop* doctrines *ECDG v Universal Oil* [1983] WLR 399 HL.

CLAUSE 11 DEFECTS LIABILITY

It should be initially noted that the title of this section is somewhat misleading because what is really canvassed here is remedying defects during the defects notification period.

The “Defects Notification Period” was described as the “Defects Liability Period” in the Red Book 4th Edition of FIDIC and the “Period of Maintenance” in FIDIC Red Book 3rd Edition. From the purely semantic point of view it seems to me less likely that misunderstandings as to the juridical nature of the period are more likely to arise if it is described as a “Defects Notification Period” than if it is described as a “Period of Maintenance”. The reason for this is that the phrase “Defects Notification” seems at least to imply that no defects may be notified after the end of this period. What is intended seems to be that defects should both be notified and corrected during the period. If they are not, the Employer’s remedy may be in a claim for an abatement or set-off.

The legal effect of the defects notification period seems quite frequently to be misunderstood in the international context. Some people certainly seem to think that it in some way it replaces the prescription or limitation period which would normally arise purely as a matter of law from the actions of the contractor in completing the work. Under English law this is certainly not the case. The limitation period commences from the date of the action or inaction giving rise to the complaint and the only possible legal significance of the activities of the contractor during the defects notification period is that further activity of the contractor in remedying defects may prolong the period within which legal actions must be commenced (in respect of the remedial work) prior to being barred by virtue of the passing of the limitation period.

Other than that, the obligations of the parties under Clause 11 are governed entirely by Contract, as there is no law in England specifying periods of maintenance after the works have been completed such as exist in some jurisdictions.

11.1 Completion of Outstanding Work and Remedying Defects; and **11.2 Cost of Remedying Defects**

The expression “fair wear and tear excepted” is a potentially troublesome expression as it arises primarily from the English law of landlord and tenant. Specifically it refers to the obligations of tenants to return property to the state it was in upon taking over the property apart from “fair wear and tear” which might reasonably have been expected as a result of the use of property.

This being the case, if one were to do a computer search of the phrase “fair wear and tear excepted” there would no doubt be hundreds if not thousands of references. It is not entirely clear how this vast body of law might reasonably be adapted to the circumstances of construction contracts where the contractor took over a site, built something and occupied the site to a certain extent while completing the rest of the works. There will be wear caused by the occupation by the Contractor of completed parts of the Works while the rest are finished.

Defects Notifications Periods can often cause problems in this context. An example I remember from the 1980’s occurred when the engineer specified and the Contractor built a tarmacadam (asphalt) parking lot with a specified thickness of asphalt of only 50mm on top of hardcore. It was probably a northern hemisphere specification because under the hot tropical suns of the site, the tarmacadam was torn up the first and every subsequent time a truck did a tight turn on the lot. Given the Engineer’s deficient specification, was this “fair wear and tear”? Under FIDIC 2nd which was the relevant Contract at the time this was not at all clear. The provisions of Sub-Clause 11.2 would have been of much assistance because the “opinion of the Engineer” has happily been removed from this provision and it simply states “if and to the extent that such work is attributable to any other cause ... the variation procedure shall apply.”

The Silver Book requirement in Sub-Clause 11.2 that the Contractor remedy all damage due to the design of the Works at his own cost (whether that design was set out in the Employer’s Requirements or not) would be more evenly balanced if it had either excepted items for which the Employer is responsible under Sub-Clause 5.2, or simply adopted the Red Book formula of only putting it at the Contractor’s cost of the remedial work was “design for which the Contractor is [solely or primarily] responsible” (Sub-Clause 11.2(a)).

11.3 **Extension of Defects Notification Period** (all Books)

This is an interesting new provision which can be welcomed on the one hand because it provides a “long stop” to the situation one sometimes sees where final certificates have been withheld due to wrangling over whether or not defects have been properly rectified. From the contractors point of view this is also an important period so far as its bonds are concerned.

I do not know why the Employer is entitled to an extension of the Defects Notification Period simply by reason of “a defect or damage”. This provision might have been more evenly balanced if it indicated that the period could be

extended by reason of a defect or damage for which the Contractor is responsible.

11.4 Failure to Remedy Defects

Sub-Clause 11.4(c) appears to allow the Employer, without reference to the Engineer, (where in the Orange & Red Books an Engineer will have been appointed) and without a determination by the Engineer as to whether or not defective work is “attributable to any other cause” under Clause 11.2 to set a date (no minimum number of days is mentioned) and if the allegedly defective or damaged work is not remedied, to “recover all sums paid for the Works ... plus financing costs and the costs of dismantling the same, clearing the site and returning the plant and materials to the Contractor.” This appears to be some sort of nuclear weapon newly granted to the Employer in relation to alleged defects and is found in all three books of the new rainbow. Under the normal principles of English contract law it is inconceivable that an Employer could have any such rights. He would be entitled to damages under the normal measure of foreseeable damages under the rules in *Hadley & Baxendale* and *Victoria Laundry* and the measure of those damages would be subject to his obligation to mitigate his loss.

Examples

Take the hypothetical position of a plant which is planned to produce something 99% pure and the contractor for technical reasons can only produce the product to a level of 80% purity. As the Employer requires 99% purity for various purposes the product is entirely useless to him and has no resale value. Under English law he would be entitled to claim wasted expenditure and perhaps a certain amount of lost profit but it is not likely that he would be entitled to an award of those lost profits for the entire life of the plant as it might reasonably be expected that if the product was physically capable of being produced he would engage another contractor to produce it within a reasonable period of time. He would not, at first glance and in the absence of special circumstances, be able to raze the factory to the ground and recover the whole of the contract price plus the financing costs.

In another example one might imagine a BOT project which is supposed to produce a certain amount of electricity for a state electrical grid but which is only capable of producing 75% of the anticipated voltage. The plant is expected to be used for 30 years and then turned over to the Government. Here again the

principles relating to mitigation of damages would be expected to take effect and it would not be possible for the Employer to claim and expect to be awarded the lost profit (discounted present value) caused by the 25% shortage over the whole of the 30 year period. Given the capital cost of these types of projects it is also unlikely that the damages awarded needed to make up the 25% shortfall would be more than the capital cost of the initial plant as paid to the Contractor.

English law is still refining the position related to these types of points, and cases involving swimming pools and stands in stadiums have led the way in indicating that reasonable damages may in some circumstances be less, sometimes quite a bit less, than full replacement cost, or the whole of the Discounted Cash Value as determined by expert actuaries. This does not mean that English law is not committed to something less than “prompt effective and adequate” compensation as required by various Bilateral Investment Treaties, but rather that the appreciation of where on the scale of possibilities the measure of that compensation lies may actually properly be below the level as determined by mathematical analyses.

In summary Sub-Clause 11(4)c seems to me to be an unsuitable new addition to these Contracts and one which would be difficult to apply on its literal terms under English law. The tricky area for employers may well lie in successfully arguing that they have been deprived of “substantially the whole benefit” of the plant/Works. Such situations are bound in truth to be both rare and highly arguable.

11.9 **Performance Certificate**

Under the EPC Turnkey Silver Book default provisions are added which result in the Performance Certificate being deemed to have been issued in certain circumstances. It is not apparent why this formula has not been followed in the Orange and Red Books as withholding of the Performance Certificate is often an issue late in the day, and claims for an issuance by Arbitration Tribunals of the Certificate are not uncommon, not least because they may be an important milestone in the financing arrangements.

A question immediately arises under English law as to whether or not the issuance of this Certificate is final and conclusive as to the Contractor's satisfactory performance of the Contract and thus stops the Employer from subsequently alleging that the work was defective. There is certainly a line of English authorities on different forms of Contract and arbitral decisions in

international contracts to this effect. The FIDIC language found here certainly allows such arguments to be made, although their efficacy may be tempered by Sub-Clause 11.0. As 11.9 only refers to the Contractor's obligations "considered to have been completed" and does not use terms such as "final and binding" it is unlikely that the issuance of the Performance Certificate would bar subsequent complaints about unfulfilled obligations.

11.10 **Unfulfilled Obligations**

This clause has its equivalent in FIDIC Red Book 4th Edition clause 62.2 and FIDIC Red Book 3rd Edition clause 62(3). I am not aware of any English cases considering the legal effect of such clauses but it seems to me unlikely that claims would be capable of being made after knowledge of the act or omission complained of was in the possession of one party or the other and the limitation period had expired. The ICE 1955 form contained an equivalent clause 62(3) which was described by in IN Duncan Wallace as "bewildering".²⁰ A Hong Kong case (Hong Kong follows English law, with the occasional exception of binding local precedents inconsistent with English law) *A.G. of Hong Kong v Wang Chong Construction Company Ltd* 8 Const. L.J. 137 (1991) did consider the Hong Kong Government Standard Form equivalent and decided this meant that the issuance of the maintenance certificate did not bar a claim arising from unperformed contractual obligations. The Sub-Clause in these contracts also has to be read with Sub-Clauses 17.2 (fourth paragraph) and 14.14.

CLAUSE 13 VARIATIONS AND ADJUSTMENTS

The Silver and Orange Book provisions relating to variations are substantially similar except that the Orange Book contains a provision (Sub-Clause 13.8) for adjustments for Changes in Costs and an exclusion clause providing that:-

"To the extent that full compensation for any rise or fall in Costs is not covered by the provisions of this or other Clauses, the Accepted Contract Amount shall be deemed to have included amounts to cover the contingency of other rises or falls in costs."

The Silver Book provides that adjustments for Changes in Costs are calculated in accordance with the provisions of the Particular Conditions, so if there are no such provisions, there is no contractual right under this Sub-Clause. A similar position applies to the Red Book, but here one has to look for cost adjustment data in the Appendix to Tender.

²⁰ Hudson's Building Contracts 10th ed., 1970 Sweet & Maxwell, London, P.489

At the time of checking this text (June 2003) there is a World Bank discussion forum considering two consultants' argument that neither governments nor customers should bear exchange rate risk, but that investors should pick it up.²¹

In practice, it is clear from the number of times this issue arises in international arbitration that comprehensive and clear provisions are needed if it is to be dealt with successfully under the terms of the contract. One must wonder if this single sentence is going to be adequate to prevent all economic disequilibrium or practical impossibility claims in the future. One suspects that the answer must be "No".

13.1 **Right to Vary**

A general point is that Sub-Clause 13.1 provides that variations may be initiated by the Engineer at any time prior to issuing the Taking-Over Certificate for the works. This gives rise (unlike previous editions of FIDIC) to a question under English law as to whether or not the Engineer may issue anything other than instructions contemplated by the Defects Notification Period provisions after the issuance of the Taking-Over Certificate. Unlike the previous editions of FIDIC it would appear that the language of this Sub-Clause bars any such instruction. Whilst this is consistent with a relatively dated line of English cases suggesting that the Engineer has no power to vary the contract after the issuance of the Taking-Over Certificate, it is not particularly consistent with common sense. In my experience on a number of international construction projects it has been desirable, indeed useful, for the engineer to clearly have a power to order variations after the issuance of the Taking-Over Certificate. These circumstances arise often when there is a late realisation on the part of the Employer/Engineer that they would like additional facilities added to the completed works or to have perfectly adequate existing facilities replaced with something qualitatively different. Whilst this can always be solved by a separate agreement, this can give rise to unnecessary complications and additional paperwork.

Another point to make about Sub-Clause 13.1 in the Red Book is that the phrase "*the Contractor shall not make any alteration and/or modification of the Permanent Works, unless and until the Engineer instructs or approves a Variation*" is probably unworkable for certain types of contracts such as dredging and tunnelling works (where, in tunnels, instant decisions as to the grouting for example, may have to be made, and may be considered to be part of the permanent works).

²¹

Phil Gray and Tim Irwin "Allocating Exchange Rate risk in Private Infrastructure Projects

The circumstances in which the Contractor may refuse to execute Variations differ between the Books. If (as is open to him under the Silver Book) the Contractor notifies the Employer that the Variation will adversely affect the safety of the Works (for which the Contractor is responsible) or adversely affect the achievement of the Performance Guarantees (again Contractor's responsibility) and the Variation Instruction is confirmed, risk for the Variation should transfer to the Employer. No contractual wording is in place for this to happen.

13.2 **Value Engineering**

My personal view is that the introduction into Sub-Clause 13.2 of the notion that variations can be reduced in value by taking into account the reduction (if any) of the value to the Employer of the varied works is an open invitation to disputes caused by subjectivity and speculative assertions from both Parties. One might also ask why the increase in the value to the Employer of the varied works should not also be taken into account in this formula.

13.3 **Variation Procedure**

None of the books seems to contemplate Variations as defined being made without relatively detailed proposals from the Contractor or instructions from the Employer, which may or may not require a proposal from the Contractor. However, as "approval" is not a defined term under Sub-Clause 13.3, Variations as defined (1.1.6.8/9) may come about through exchanges of Site correspondence of the normal sort, and in a rather more informal fashion than the FIDIC draughtspeople intended.

When is a variation not a Variation?

The Red & Orange Books do not allow changes to the Permanent Works (which concept is very poorly defined) without a prior approval or instruction from the Engineer. The Silver Book does not allow Employer designed items to be Variations as defined (see the definition of permanent works designed and executed by the Contractor). So – what happens if there is a major modification in Temporary Works or (in Silver) to the Permanent Works designed by the Employer? English Judges and Arbitrators have not, historically, been happy to see Employers receive something for nothing, and there are doctrines such as quantum meruit, definitional devices, and other means to ensure fairness is

achieved. It should be recalled that historically, if no right was given to the Employer to vary the contract, he could not, and the Contractor was perfectly entitled to perform in the contractually agreed fashion and demand payment.

If the relatively restrictive FIDIC Variation procedure does not apply for one reason or another, it is open to arbitrators and other adjudicators to determine that a collateral contract or perhaps even a separate agreement, gave rise to a right to payment.

CLAUSE 14 CONTRACT PRICE AND PAYMENT

14.1 The Contract Price

Under English law and the doctrine of “entire contracts” the Common Law right to payment for the supply of goods and services does not arise until the whole contract has been performed. This can be modified by contract but the contractual entitlements can only arise on (strict) performance of the obligations which will give rise to the entitlement.

In the case of “unit price” contracts or staged payments, some commentators have argued that these give rise to a series of “entire” contracts within the overall framework. Such an analysis would give a justification for interest payments from the date the obligation/stage is completed.

14.6 Issue of Interim Payment Certificates

Over the years England has seen a fair amount of case law on the circumstances under which an employer may withhold payments under contracts of this nature because of alleged failings on the part of the contractor. Distinction must be made between contractual rights to withhold sums said to be due (as found in this Sub-Clause) and rights which exist at Common Law.

Rights said to exist at Common Law exist by virtue of the operation of the doctrine of set-off. Whilst the law in this area is probably unnecessarily complicated, it is certainly true to say that the right to set-off must be distinguished from the right to counterclaim if a dispute arises. Set-off (like abatement) is an absolute defence which exist by virtue of the operation of the law and could normally be raised very late in the day even if (assuming an ICC Arbitration clause) the Terms of Reference had been fixed under Article 18 of

the ICC Rules and, perhaps, even if the Tribunal made a determination under Article 19 of the Rules that it was too late in the day to raise the set-off claim.

While it may be easy to assert that contractual mechanisms should work in accordance with their terms and of course to be effective should be operated exactly in accordance with the clause in question, the existence of this doctrine is a threat that, under English law, the contractual payment provisions will be frustrated in the face of a set-off claim. Unfortunately, it may depend very much on the lottery of what sort of tribunal you are in front of.

14.8 **Delayed Payment**

Under English law legal rights exist to receive interest for delayed payment. However for historical reasons the right has been complicated by the requirement to distinguish between the period prior to the issuance of the writ or demand, the period during which the demand is adjudicated upon, and the period after which the award is issued.²²

Historically it was also difficult at one time to receive compound interest in certain circumstances. This has now, for arbitrations at least, been solved by Section 49 of the Arbitration Act 1996 which grants broad powers to arbitrators where the seat of the arbitration is in England. Nonetheless, traditionally minded arbitrators may feel that only simple interest should be paid, whatever their rights as arbitrators to award interest may be.

For English contractors, and any other organisation with a “substantial link” to the UK, relief may also be available through The Late Payment of Commercial Debts (Interest) Act 1998, although there are some restrictions on who this Act applies to. If Sub-Clause 14.8 is unamended in the contract in question, it will probably not apply. If it has been deleted, the Act might apply.

Delayed payment clauses may arguably sometimes not result in a right to interest or financing charges for the period of delay in circumstances where no right to payment arose because there was a serious difference as to entitlement and entitlement did not come into existence until the Judge or Arbitrator decided that a right to an increased certification or payment existed.

A DAB will not be able to award interest, unless it is “the payment of financing charges in accordance with the Contract” (DAB Procedural Rules Clause 5f

²² See paragraph 8.088 in Wallace *Hudson's Building Contracts 11th edition* London, Sweet and Maxwell, 1995

(Silver Book) or 8f (Red Book)), so if interest is a large element of the dispute, resort to arbitration may be necessary to recover it. Unlike the DAB, the Arbitral Tribunal could award interest at its discretion whether Sub-Clause 14.7 had been operated or not.

It is also worthwhile to record that the phrase “financing charges” is a legal term of art in England and may be, because of the complicated case law referred to above, distinguished from the concept of interest as damages for late payment. In *Minter v. WHTSO* (1980) 13 BLR 1, financing charges for late payment of variations for disturbed progress was recoverable as “direct loss and expense”.

It must thus be realised that although the right to receive “financing charges” payment for delayed payment in Sub-Clause 14.8 is to be welcomed, the operation of the Sub-Clause may not be without difficulty. In particular, it has been successfully argued that as there was no financing in fact, no financing charges are payable. It would be strange, but not unthinkable, that an arbitrator might accept a version of such an argument here.

It should finally be noted that as is the case with the famous London Inter Bank Offer Rate (LIBOR), which consists of 4 different rates, the concept of the “discount rate of the Central Bank in the country of the currency of payment” is likely to cause difficulty because there may or may not be something called a discount rate in the country in question and there could very well be more than one rate identified as a possible candidate.

It seems curious that the operation of the delayed payment provisions does not seem to be contemplated in the case of payment of retention money unless such payment is certified by an IPC (Interim Payment Certificate). In my experience it is not uncommon for retention money to be withheld without good reason.

14.14 **Cessation of Employer’s Liability**

This clause provides “*the Employer shall not be liable to the Contractor for any matter or thing under or in connection with the Contract or execution of the Works, except to the extent that the Contract shall have included an amount expressly for it (a) in the Final Statement and also (b) in the Statement at Completion.*” There is a proviso stating that the Sub-Clause does not limit the Employer’s liability under his indemnification obligations, or in any case of fraud, deliberate default or reckless misconduct by the Employer. This clause was also

found (with variations in the terminology) in clause 60.9 of the Red Book 4th Edition and 62.2 of Red Book 3rd Edition.

This is quite an extraordinary provision which is not obviously susceptible to being overturned in arbitration. Prudent contractors would ensure that all, even mildly contentious issues or claims which had remained unsettled throughout the course of the Contract, would be wrapped up in the Statement on Completion and Final Statement. There are cases in English law on these types of provisions and if a statement on completion does mention an entitlement or alleged entitlement it is fair to say that the exclusory aspects of this clause will probably be considered *contra proferentem*²³ so that the clause should not be allowed fully to bite.

The Sub-Clause is difficult to reconcile with Sub-Clause 11.10, and is not made with reference to that Sub-Clause, with the result that reconciling the legal effects of the two will not be easy.²⁴

“Deliberate default or reckless misconduct” are not terms of art under English Civil Law as is *faute lourde* under French law and the words would have to be construed according to their ordinary meaning. One might thus speculate that a failure to pay through an honest or unintentional default would not be saved by the clawback provisions of the clause. As many failures by an Employer to pay are in my experience a result of honest differences of opinion with contractors it would remain to be seen if a deliberate but honest failure to pay would be barred. On its face the word “deliberate” makes no distinction between honest and somehow fault based failures to pay, but the word “default” implies a failure to comply with a contractual obligation, perhaps simply through reckless neglect.

CLAUSE 15 TERMINATION BY EMPLOYER

Under English law a party has a right to terminate an executory contract upon the commission by the other party of a repudiatory breach of contract. When such a breach occurs the party affected by the breach can either affirm the contract and continue performing or accept the act of repudiatory breach and treat the primary obligations under the contract as being at an end. Other contractual provisions relating to the consequences of termination or obligations at law will still continue to be effective. In such circumstances secondary

²³ See *A.G. v Wang Chong* discussed under 11.10 above.

²⁴ See commentary on the 1955 ICE equivalent provision in *IN Duncan Wallace The International Civil Engineering Contract*, Sweet & Maxwell, London, 1974 pp152-153.

contractual obligations arise. The breach complained of must be sufficiently serious to entitle the party affected by it to treat the contract as being over²⁵.

This right exists independently from and normally in addition to any contractual rights to determine the contract. See for example *Laing & Monriison-Knudson v Aegon* (1997) 86 BLR 70 (QBD).

If a contractual right to terminate is wrongly exercised by either party, that wrongful exercise in and of itself may be thought to constitute an act of repudiatory breach of contract capable of being accepted by the other party²⁶.

It is quite normal in England upon the purported operation of a contractual right of determination by one party to see the other party, if competently advised, respond by indicating that the purported operation of the contractual right of determination is itself a repudiatory breach of contract which has been accepted. Thus the court room or arbitral drama played out will normally be to the effect of whether or not the contractual right was properly exercised and if not, what damages are payable for repudiatory breach of contract.

15.1 **Notice to Correct**

It is doubtful that under English law the phrase “if the Contractor fails to carry out any obligation [*emphasis added*] under the Contract” would be taken literally especially as it ties directly into a right to terminate a contract under Sub-Clause 15.2. The legal maxim *De minimis non curat lex* (the law takes no notice of trifling matters) is a basic part of every law students’ education and would apply here. If one looks hard enough, there are reported decisions, and arbitral awards, implying a duty to exercise this power reasonably. For example, Authority exists in the Australian State of Victoria for the proposition that any determination clause must be operated reasonably. Whilst there is no direct English authority on this point it is quite likely that this is an underlying theme of the decisions taken on determination clauses over the years and that implicitly if not expressly this concept would be accepted in English law.

15.2 **Termination by Employer**

It should be noted firstly that the circumstances giving rise to a potential right to determine are set out very broadly in this clause.

²⁵ *Suisse Atlantique Société d’Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, H.L.(E.)

²⁶ *ibid*

Whilst some of the events set out in 15.2 would constitute a common law act of repudiatory breach (abandoning the works, failing to proceed with the works, assigning the contract without agreement) others clearly do not (failure to comply with a Notice to Correct (in certain circumstances), failing to comply with any aspect of Sub-Clause 4.2 [*Performance Security*] and offering any person a gift in relation to the contract.

I personally would be reluctant to glibly advise that the gift of a \$50,000 automobile to an employee of the Engineer or a government employee would be sufficient to determine a \$50 million contract under English law, especially as the illegal acts of employees are not automatically attributable to their company. It might be noted in this context that “private – private” bribery is not made illegal under the recent OECD Convention concerning public - private bribery. English law also distinguishes between illegal acts in foreign jurisdictions and illegal acts at home so presumably some fine questions would arise in relation to overseas contracts governed by English law.

On a purely textual note, it should be noted that the phrase “However, lawful inducements and rewards to Contractor’s Personnel (remember the broad definition of personnel referred to above) shall not entitle termination.” is actually non-sensical. As noted, what is and is not lawful may be very difficult to determine, especially in a contract governed by English law but performed entirely outside the UK.

The phrase “best efforts” found in the pre-penultimate paragraph of Sub-Clause 15.2 is a term of legal art in England which has generally be construed to mean something short of doing the act (needing to be done) at all costs.

Staying with the same Sub-Clause while it may be a good idea for the Contractor to assign sub-contracts I have some doubts as to the efficacy of this clause and the ability to enforce it, either as against the Contractor or any sub-contractor, without appropriate language in the sub-contracts.

Looking at the penultimate sub-paragraph of Sub-Clause 15.2, it seems to me that to the extent that the Contractor’s Documents consist of proprietary information licensed to the Contractor but no other person, the Employer should be wary of considering himself automatically entitled to any intellectual property rights not vested directly with him, as this Sub-Clause could not reasonably be seen to be a clause transferring such rights to the Employer or “another entity”. It would not bind third parties unless the licence itself provided for this.

15.4 **Payment after Termination**

Under English law people who suffer loss have an obligation to mitigate their damages/loss. Whilst this Sub-Clause purports to give employers a right to recover (conjunctively) “losses, damages and extra costs, ...” it is unlikely that this clause would be construed as anything more than a right to recover the normal foreseeable loss as determined by the normal English rules for recovery of loss of damages for breach of contract following the leading cases of *Hadley and Baxendale* [1854]9 Ex 1 and *Victoria Laundry*. [1949] 2 KB 528

In operating this Sub-Clause it should be the case that if the Employer could have foreseeably been expected to pay more than the contract value (say because of unforeseen problems) at the time of termination his recovery under this clause should not be the total value of completing the works less the valuation at the date of termination determined under Sub-Clause 15.3. The proper valuation should be the total cost of the works less the reasonable total costs of the works, in any event, subject to the Employers obligation to mitigate. It is unclear whether this result will be achieved by Sub-Clause 15.4.

15.5 **Employer’s Entitlement to Termination**

Convenience determinations on notice are well known under American law. There is no equivalent body of construction case authority under English law.

Nonetheless, rights to terminate contracts on notice are very well recognised under English law, and unlike the previous provisions, should operate reasonably smoothly without pitfalls for the unwary.

CLAUSE 16 SUSPENSION AND TERMINATION BY CONTRACTOR

Unlike the position in France it is not clear under English law whether or not contractors have a common law right to stop work independent of the right to treat the contract as repudiated discussed above. I would expect that for the contractual rights here to be exercised successfully, they would have to be operated strictly in accordance with their terms because there is also the danger that the response from the Employer will be that the purported contractual termination amounts to a repudiation of the contract which he accepts under the Common Law. Sub-Clause 16.2(c) (Silver Book) and 16.2(b) (Red Book) are particularly subjective in this respect.

CLAUSE 17 – RISK AND RESPONSIBILITY

It is not obvious why suspension or stoppages attributable to the Employer should be subject to the claims procedure in Clause 20.

These provisions set out the respective parties' rights and duties in respect of the identified risks in a clear and comprehensive fashion and FIDIC should be applauded for this.

17.1 Indemnities

The symmetrical provisions of this clause purporting to limit each parties' liability in certain circumstances may be capable of being challenged under the Unfair Contracts Terms Act 1977 test of reasonableness.

17.2 Contractor's Care of the Works

The restricted scope of eclectic phenomena found in Sub-Clause 17.3 of the Silver Book may tip the absolute obligation of the Contractor in this Sub-Clause towards the unreasonable. There is no reason why, for example, damage caused by occupation and use by the Employer of one part of the Works (as itemised in Red Book Sub-Clause 17.2(f)) should be repaired at the Contractor's expense.

17.3 Employer's Risks

This includes a pretty standard FIDIC shopping list of risks the Employer takes. It includes (not in Silver) design of any part of the Permanent Works by the Employer's Personnel which term is defined to include the Engineer. This could certainly mean under English law despite the wording of Sub-Clauses 4.11 and 4.12 of all Books if the Engineer designed tunnelling works by specifying a certain type of TBM with certain types of characteristics the cost of digging by hand to deal with unexpectedly bad ground conditions could be attributable to the Employer, whether or not such bad conditions were (as they usually are) "foreseeable" in a general sense.

17.6 Limitation of Liability

There is authority in England to the effect that exclusions of consequential loss only exclude the second limb of *Hadley & Baxendale*, and would not exclude direct loss, although there are cases of all sorts of this topic. There is at least

one construction case decided under English law in a non-UK contract, which refused to honour the “second limb” cases, and held that the exclusion was effective.

From the Contractor’s point of view, this Sub-Clause may limit potential liability under Sub-Clause 11.4 (Failure to Remedy Defects).

CLAUSE 19 FORCE MAJEURE

Many countries have their own laws relating to force majeure which may or may not overlap with the force majeure provisions found in the FIDIC forms. England is not in this position. Force majeure is only a contractual concept although it shares common roots with the doctrine of frustration, which is a part of English law. English jurisprudence relating to frustration is brought in by the wording of Sub-Clause 19.7-(release from performance under the law). However, hardship, inconvenience or monetary loss do not constitute frustration under English law. *Davis Contractors v Fareham UDC* [1956] AC 696. A tribunal deciding under English law would strive to apply these provisions as they stand, while all the time bearing in mind the general hostility since *Davis*, to notions of practical impossibility. It might also be noted that even in *Davis* itself, there is wording which may result, one day, in a resurrection of a doctrine more in line with, say, American law.

Clause 19.7 is a rather interestingly worded clause. The doctrine of frustration under English law would have been there to protect the parties in any event, so what this clause primarily does is expand the definition of frustrating events and regulate certain of the consequences of frustration or other events in releasing the parties from performance.

Doctrine of Frustration

The difficulty in relation to frustration derives from the 1956 *Davis* case where the House of Lords held that mere difficulty of performance making a contract more onerous was not sufficient to discharge a party under this doctrine. With some small exceptions this put an end to apparently more liberal cases²⁷ which foreshadowed the possibility of extending relief to cases of commercial impracticability as is found in the American codes and cases, where as the French say *L’economie du contract* no longer makes sense. The House of Lords were looking in the *Davis* case at a lost of £15,000 caused by (foreseeable) shortages of skilled labourers because of the then still depressed post-war state of the English economy. It is almost 50 years since this case was decided and the circumstances in England are vastly different as are the sums of money which are being spent in construction matters. It cannot reasonably be argued that the wording used in that case was meant to apply to the Channel

²⁷ *Bush v Whitehaven Port & Town Trustees* Hudson’s BC (4th Ed., 122)

Tunnel, and in any event, there are other more liberal elements of the case which have been forgotten by the proponents of the notion that you should never plead frustration because the standards which are set are too high and too absolute.

One of the peculiar features of English law is that unlike many other jurisdictions you can contract to do the impossible *Paradine v Jane* (1646) Alleyn 26. However if the thing you contract to do subsequently becomes truly impossible the doctrine of frustration should be there to give you relief.

CLAUSE 20 CLAIMS, DISPUTES AND ARBITRATION

As a preliminary note to bear in mind with these contracts the form of dispute resolution is to be indicated in the Appendix to Tender which under clause 1.5 has a relatively high priority. I have already been involved in a case on the test edition for plant where the Appendix to tender stated one form of dispute resolution but the Particular Conditions indicate that Sub-Clause 20 was to be amended by removing the reference to the ICC and inserting the reference to another institution. Under the governing priority in these circumstances this clear conflict is resolved by noting that the Appendix to the tender has a higher governing priority than the Particular Conditions.

As another general point - the procedure for ultimately receiving the DAB's decision is a relatively complex one and takes a fair amount of time. Under English law there is certainly no problem with agreeing to modify a provision such as this or forego it altogether. There is also no reason under English law why one shouldn't institute the formal procedure and, say, mediate at the same time.

Further, it should be noted that there is no one Clause under these Contracts entitling one to prolongation costs for an Extension of Time or Variation.

20.1 It seems inevitable that the second paragraph of sub-clause 20.1 with its wide ranging and apparently complete exclusion of claims for money or time unless the relatively onerous notification provisions are met will be a subject of much controversy during the course of these contracts. How English law might treat this is discussed below. Contractors inevitably fail to notify perfectly legitimate claims, employers are normally happy to take the improved products and disputes will arise. This is especially so as the final paragraph of this Sub-Clause introduces a large element of subjectivity in the evaluations of notified claims.

Under English law there are a number of devices which might allow the apparently onerous consequences of the second paragraph of 20.1 to be avoided, and some of these are set out below. It should be noted however, that there are certainly reported cases where similarly hard clauses have been enforced in accordance with their terms.

Firstly, the claims notification provisions should not apply to breaches of contract. Consequently if it can be alleged that the employer breached the contract either directly or via his agent the engineer (remember the clear provisions qualifying the Engineer as the agent of the Employer in Clause 3) then a failure to certify, a failure to pay, a failure to properly order a variation could all be characterised as breaches of contract to which the claims provisions do not apply. This position should apply despite the apparently inclusive language in Sub-Clause 20.1 referring to claims under the Contract “or otherwise”.

Secondly, this Sub-Clause along with other clauses in the contract seeking to exclude or limit rights which otherwise would exist, is clearly subject to the terms of the Unfair Contract Terms Act 1977 which requires in commercial contracts such as this that the clause seeking to limit or exclude rights be subjected to a test of “reasonableness”. It is perfectly possible of course that an arbitrator deciding on the reasonableness of the clause, could decide the Sub-Clause exclusion is perfectly reasonable.

An interesting conflicts of laws issue may arise in contracts governed by English law but executed in one of the jurisdictions around the world where a clause like this would be considered to be void. In some circumstances it may be possible to argue that the mandatory laws of the place of performance cannot be excluded.

It is also possible that the arbitrator could decide that that failure to give notice is merely a technical breach of contract by the contractor *Merton v Leach* (1985) 32 BLR 68 @ 90. This is not an argument which will be successful in every case. One certainly comes across cases where contractual time bars have been effective in excluding claims.

Finally, it certainly seems arguable that prior determinations under Sub-Clause 3.5 may not actually be necessary for disputes to be referred to the DAB under Sub-Clause 20.4.

20.2 **Appointment of the Dispute Adjudication Board**

DAB's had their origin in America in the early nineteen 70s and there certainly are a number of proponents of them. The notion was enthusiastically adopted by both FIDIC and the World Bank and now they are a regular feature of modern forms of contract. It is not entirely clear how well they are operating. I have certainly had one contract where the DAB was named as the Engineer. This is a move which I expect would effectively frustrate the intentions of the drafters of the DAB provisions.

20.4 **Obtaining Dispute Adjudication Board's Decision**

The DAB's decision will have contractually binding effect as between the parties under English law *Channel Tunnel v BBCL* 1993 61 BLR1 HL. It may be possible to enforce the decision by approaching the Courts and asking for a summary judgment for breach of contract. If something that looks like specific performance may be involved this could clearly cause problems. There is also a reasonably good possibility that the Courts would refer you to ICC arbitration by virtue of the ICC arbitration clause. If you wanted a quick remedy the ICC President could use his authority under Article 1.3 of the ICC Rules to expedite the formation of the tribunal and give you a summary award quite quickly.

While most tribunals would be expected to give effect to the provision requiring that the DAB decision is to be given effect to until revised in arbitration (the same wording as used in the Channel Tunnel) there is always a danger that a particular tribunal will accept an argument that the contract should not mean what it says and the DAB decision should not be "given effect to".

20.5 **Amicable Settlement**

There had been some discussion in English circles about what, if anything, is required of the parties faced with clauses such as this. Can a clause requiring each party to attempt an amicable settlement require them to negotiate for example? Agreements to negotiate are normally said not to be effective under English law.

No doubt the clause will have to be dealt with in some fashion and the simplest way of showing that the requirements have been met might simply be to send a without prejudice letter (which under English law would be protected from

disclosure to later Judges or Arbitrators) offering to settle the matter at fixed terms.

Alternatively this may be an opportune moment to introduce a mediator and request his assistance in a genuine attempt to facilitate an amicable settlement. Amicable negotiations are not a necessary precondition to arbitration as is sometimes seen because the Sub-Clause has a 56 day long stop after which arbitration may be commenced in any event.

20.6 **Arbitration**

Generally speaking England is a good venue for ICC arbitrations and the English Courts respect ICC arbitration considering it to be a complete set of rules which binds the parties behaviour. The Courts are thus seen to be reluctant to interfere. *Bank Melat v Helliniki Techniki SA* [1983] 3 WLR 783 CA. There have been at least two occasions where the Courts have granted orders for security for costs in respect of ongoing ICC arbitrations. The *Ken-Ren* case is one of the most famous because an order for security for costs was granted by the English Courts when faced with an impecunious respondent in the arbitration.²⁸

English Courts have also upheld ICC awards based on general principles of law. Under English law unless otherwise agreed the parties would have to go through the whole dispute resolution procedure set out in Sub-Clause 20 before being able to commence ICC arbitration. It is always of course available to the parties to agree to forego certain steps if they so agree.

So far as arbitrators' conflicts of interest go a large number of reasonably high profile cases involving General Pinochet, Yves Fortier and others have restated and cleared up the law in England and, generally speaking, it is not as unforgiving as some American jurisdictions.

I personally believe that ICC arbitration is very well suited for international constructions disputes for several reasons:-

- (i) The rules are very flexible as to the procedures adopted by the tribunal yet are fail safe enough to ensure that dilatory parties cannot forestall arbitration for any great period of time or even frustrate the appointment of the tribunal.

²⁸ *Coppeel Lavalin SA v Ken-Ren Chemicals* [1994] 2 WLR11631 HL.

- (ii) The Secretariat of the ICC are very professional, multi-lingual and bring a great deal of international experience to the case. In addition to that the supervisory functions of the Court result in every award being reviewed and reported upon by the Secretariat and then reviewed by the individual court members and discussed with the Secretariat. This system facilitates a high quality product.

- (iii) The Rules themselves have some particular aspects which are better for international construction arbitrations. For example under some arbitral systems requests go in, answers are made and unless the tribunal orders otherwise a dispute “crystallises” at that early stage. In ICC arbitration on the other hand any number of short or vastly long requests and answers can be submitted. Then in the period leading up to the terms of reference, if it turns out additional claims should be made (as it is often the case in construction matters in that some claims may be complete, some claims are old, some claims are still being finalised), all of these claims can be grouped together and included in the Terms of Reference and thus in the arbitration. Furthermore, under Article 19 it is possible to have the Tribunal agree to introduce new claims not mentioned in the Terms of Reference.

One unfortunate aspect of clause 20.6 is that it requires the dispute to be heard by three arbitrators. This means that relatively small disputes of say \$100,000 US or less may be practically inarbitrable. The ICC formulation of one or more arbitrators would have given the Court liberty to appoint a single inexpensive arbitrator in small disputes.

Sub-Clause 20.7

The interaction between 20.6 and 20.4 is not straightforward. For example, the wording of the beginning section of 20.6 and 20.7 is similar in discussing what can be arbitrated in the event that decisions have not become final and binding. The whole Clause 20 scheme assumes single issue DAB decisions (while many of them are final account multiple issue disputes) – what if some of the decision is disputed, and some not?

Further, if one party gives a notice of dispute and the other does not, can the Respondent then dispute the whole of the Decision, including parts not disputed by the other party?

Finally, if a dispute is referred to arbitration after it has become binding with no Notice of Dissatisfaction having been served, is the non-paying party entitled to reopen every issue that it fought and lost or did not fight in front of the DAB?

CONCLUSION – THE POT OF GOLD IS IN THE TEXT?

We all know that, try as we might, we will never reach the pot of gold found at the end of the rainbow. The application of this FIDIC construction “rainbow” and English law to projects will not produce any great shocks, and the outcome of many issues should be reasonably clear, thanks to the wealth of English authority on the point (or similar points) in similar English contracts. The English doctrine of freedom of contract also means that normally the words of these contracts will be applied literally (as opposed to purposefully) and there is less chance in England of overturning the words by reference to an applicable statute, than there might be in some countries.

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